SUPREME COURT, U.S.
FILED
AUG 27 1968
CLERK

No. 445

Supreme Court of the United States

EDWARD LEE ROBERTS, PETITIONER-APPELLANT,

versus

COMMISSIONER OF INTERNAL REVENUE

RICHARD LEE PLOWDEN AND DALE T. PLOWDEN,
PETITIONERS-APPELLANTS,

versus

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT-APPELLEE

PETITION FOR WRIT OF CERTIORARI

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AS THERE CONSOLIDATED IN ONE RECORD OF EDWARD LEE ROBERTS, No. 12,111, RICHARD LEE PLOWDEN ET UX, No. 12,253

EDWARD LEE ROBERTS,
No. 12,111,
2512 Heyward Street,
Columbia, S. C. 29205.

RICHARD LEE PLOWDEN,
Et Ux, No. 12,253,
916 Daly Street,
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Supreme Court of the United States

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PETITIONERS

Petition to apply for Writ, or Writs, of Certiorari to review the Decision of the United States Court of Appeals for the Fourth Circuit on the above consolidated cases.

These two cases as consolidated in the appellate court were reviewed and decided in one decision on June 20, 1968, by the United States Circuit Court of Appeals for the Fourth

Circuit, said cases being previously heard consolidated by the Tax Court of the United States as case No. 48 T.C. No. 64. The questions of law in both of these two cases are identical, and the facts in evidence were resolved in one stipulation of the parties since all the facts were of similar nature with slight difference only in valuations. These two similar cases related to carryback recoveries by each of these petitioners from their tax years of 1960, 1961 and 1962, such recoveries being predicated on a small business corporation net operating loss under 26 USCA Sections 1371-1377 in the year 1963. These petitioners were the only two stockholders in the small business corporation which had elected on November 1, 1961, to be taxable under Subchapter S Section 1371(a), and these petitioners were denied said carryback recoveries by the Commissioner, which gave rise to this proceeding.

The statutory terms of 26 USCA, Subchapter S, Sections 1371-1377 are at variance with earlier established and controlling *corpus juris* elsewhere, it only being possible by just exercise of the jurisdiction of the Supreme Court in the matter of this petition to decide the true rights of these taxpayer petitioners as they duly petition here for relief. It appears that the Supreme Court has not yet ruled on the tax statute 26 USCA, Subchapter S Sections 1371-1377 as now being prayed for by these petitioners in this petition.

The questions presented and the reasons relied upon by these petitioners in their prayers for allowance of a writ, or writs, of certiorari for the two consolidated cases *supra* are as follow:

(a) The appellate court below only made a narrow application of 26 USCA, Subchapter S Sections 1371-1377 to construe the statute in the appellate decision made on June 20, 1968; such restriction of the appellate jurisdiction patently failed to definitively answer the true issues raised by the petitioners as said issues bore on the tax rights of the petitioners, which tax rights previously had been brought into confusion by the Commissioner enforcing "on the face" terms of Sections 1371-1377.

(b) The appellate court erred in denying to the petitioners **due process of law** in the matter of oral argument under the commanding terms of Rule 15 of the CCA 4th. (Appendix.) Oral arguments were strictly set by the appellate court to be called on Wednesday, June 19, 1968; then summarily on June 12, 1968, the appellate court revoked the oral argument by these petitioners, such revocation being without any desire or agreements of these petitioners for such deprivation of their appearance in the appellate court prior to any decision on their causes.

(c) The appellate court erred in not ruling, as prayed for by these petitioners, on the several serious conflicts of law arising when application was made to petitioners' causes of presumed "on the face" operation of 26 USCA, Subchapter S Sections 1371-1377 terms, said terms being contrary to earlier and controlling law of the basic property rights of these taxpayers as prayed to the appellate court by these petitioners. Mere "on the face" application of the terms of 26 USCA, Subchapter S Sections 1371-1377 even controvert certain prior decisions of the Supreme Court. ~~(Supporting Brief).~~

(d) The appellate court erred particularly in presuming that petitioners had solely relied on mere force of Section 172 to effect nullification of the limitations of Section 1374, when other **direct conflicts of earlier established law, such as law of suretyship** in making payment to government in behalf of other individuals, had been set forth by these petitioners in primary proof of necessary nullification of Section 1374.

(e) The appellate court erred in applying Section 172(h) against these **individual** taxpayer petitioners as an **individual limitation** since Section 172(h) shows on its face that it is operational solely **against the corporation** as a **corporate limitation** only; and here the **corporation is clearly not a party** in this court. Section 172(h) has no term limiting net corporate operating loss **to shareholders**, provided that such shareholders might evolve from **other operation of law** a valid right to a corporate net operating

loss as their causes here assert. Section 1374 does not stand alone in corpus juris as the Commissioner seems to imply, and the mere reading of its unusual limitation terms is a warning of its radical departure in the law of limitations otherwise and earlier so clearly and justly defined to protect the true property rights of all proper claimants. This last protection is what these petitioners pointed out in their petitioning and briefing throughout these proceedings before the courts, and at last pray the Supreme Court to give its careful consideration to this tax matter so the truth may prevail at last. Section 172(h), being only of corporate force, is irrelevant to Section 1374 in its sole alleged individual limitations, and the presumed relevancy of these separate sections showing in the appellate decision is in error.

(f) The appellate court erred in not deeming that the proper operation of Section 172 would *sua sponte* adequately protect the causes of these petitioners if separately the conflicts of Sections 1371-1377 with other and longer established laws were recognized so as to compel Sections 1371-1377 to be operative only in just limits such conflicts with other law had prescribed.

For the reasons set forth from (a) through (f) supra as they highlight this entire tax proceeding record, these petitioners pray the Supreme Court to allow issuance of proper writ, or writs if pertinent, of certiorari as may permit a further review and construing of the statute and the proceedings so that the relief petitioned by these taxpayer petitioners may justly be granted them, with reversal of the decision of the United States Court of Appeals for the Fourth Circuit as made and decided on June 20, 1968. This seems in the public interest as the small businesses subject to control of 26 USCA, Subchapter S Sections 1371-1377 are businesses with a multitude of shareholders of rela-

tively small possessions who might be lured to their harm if said statute is not properly clarified for their guidance.

Edward Lee Roberts (L. S.)
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Columbia, South Carolina.

Richard Lee Plowden (L. S.)
RICHARD LEE PLOWDEN,
916 Daly Street,
Columbia, South Carolina.

Dale T. Plowden (L. S.)
DALE T. PLOWDEN,
916 Daly Street,
Columbia, South Carolina.

Date Aug. 26, 1968,
Columbia, South Carolina.

VERIFICATION

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND.

Personally appeared before me, Edward Lee Roberts, Richard Lee Plowden and Dale T. Plowden, who being duly sworn, depose and say that they are the petitioners named within; that they have read the foregoing petition and that the matters and things therein stated are true of their own knowledge, except those matters and things on information and belief and as to those they believe them to be true.

Sworn to before me this
26th day of Aug., 1968,
Suzanne Tyson (L. D.)
Notary Public for South Carolina.

My commission expires at the pleasure of the Governor.

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United States Court of Appeals

FOR THE FOURTH CIRCUIT

NO. 12,111

EDWARD LEE ROBERTS, PETITIONER,

versus

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

NO. 12,253

RICHARD LEE PLOWDEN AND DALE T. PLOWDEN,
PETITIONERS

versus

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

ON PETITION TO REVIEW THE DECISION OF THE TAX COURT OF THE UNITED STATES

(Submitted June 19, 1968. Decided June 20, 1968.)

Before HAYNSWORTH Chief Judge, and SOBELOFF and BOREMAN, Circuit Judges.

Edward Lee Roberts and Richard Lee Plowden, *pro se*, on briefs for Petitioners, and Mitchell Rogovin, Assistant Attorney General, Lee A. Jackson, Gilbert E. Andrews, and Marco S. Sonnenschein, Attorneys, Department of Justice, on brief for Respondent.

PER CURIAM:

The decision of the Tax Court[1] is affirmed.

Taxpayers believe themselves wronged in the instant case because of a basic misunderstanding as to the interaction of §§ 172 and 1374 of the Internal Revenue Code of 1954.[2] They argue that § 172 takes precedence over § 1374 and entitles them to a larger net operating loss deduction than that computed by the Commissioner. What they fail to perceive, however, is that under the circumstances of this case, § 172 is not applicable to them.

During the period critical to the determination of this controversy, taxpayers were equal partners in a corporation for which they had elected Subchapter S treatment.[3] The corporation suffered a substantial loss for the taxable year 1963, a loss which gives rise to the instant controversy.

The starting point for ascertaining the tax consequences of the loss in question is § 172(h) which provides:

> In determining the amount of the net operating loss deduction under subsection (a) of any corporation, there shall be disregarded the net operating loss for such corporation for any taxable year for which such corporation is an electing small business corporation under subchapter S.

---

[1] 48 T.C. No. 64.

[2] 26 U.S.C.A. §§ 172, 1374.

[3] See 26 U.S.C.A. §§ 1371-1378.

Thus, it is clear that where Subchapter S. status has been elected, a net operating loss is unavailable to the corporation itself and § 172 is inapplicable to it. Rather, it was determined by Congress that such a loss should be made directly deductible by the shareholders[4] within certain limits.[5] The taxpayers seek to take advantage of the direct deduction but also seek to escape its corresponding limitations. They argue apparently that §§ 172 and 1374 should be read together as making the full corporate loss directly available to them even when it exceeds the adjusted basis of their investment in the corporation. The statutory scheme, however, simply will not bear such reading. As shown above it is clear from § 172(h) that the operating loss in question is unavailable to the corporation for purposes of the carryback and carryover provisions of § 172. It is clear then that in the absence of further provision the loss would confer no tax benefit either directly or indirectly on the shareholders, for the loss belongs to the corporation and not to them individually. § 1374, however, with certain limitations, extends directly to the shareholders the right to deduct a pro rata share of the loss. This right of the shareholder to deduct personally a portion of the loss suffered by the corporation is created by § 1374 and is in no way dependent upon § 172 for its existence. It would be odd then to hold with the taxpayer that § 172 somehow nullifies the limitations placed upon the right in unequivocal language by § 1374. This is not to suggest that once the size of the deduction has been determined under § 1374 there is never any interaction with the carryback and carryover provisions of § 172. Where the deduction allowed under § 1374 is not completely offset by the shareholder's personal income from other sources in the year of the corporate loss, then those provisions become relevant. But this occurs only when it has been determined that the shareholder individually has suffered a net loss and not simply the corporation. In the instant case it appears that taxpayers were able to make full use of the deduction

[4] § 1374(a) & (b).
[5] § 1374(c) (2).

allowed by § 1374 in the year the corporate loss was sustained, and, therefore, § 172 is inapplicable.

Other contentions advanced by taxpayers have been adequately dealt with in the opinion of the Tax Court and further comment would be repetitious.

For the reasons set forth above and by the Tax Court, the decision of the Tax Court is affirmed.

Affirmed

APPENDIX A

Docket No. 5081-65

TAX COURT OF THE UNITED STATES
WASHINGTON

EDWARD LEE ROBERTS, PETITIONER,

versus

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, filed August 9, 1967, it is

ORDERED and DECIDED: That there are deficiencies in income tax for the taxable years 1960, 1961, and 1962 in the amounts of $1,213.82, $3,394.59, and $7,079.85; and that there is no deficiency in income tax for the taxable year 1963.

(Signed) CRAIG S. ATKINS,
Judge.

Entered: Nov. 1, 1967.

TAX COURT OF THE UNITED STATES
WASHINGTON

Docket No.5081-65

RICHARD LEE PLOWDEN AND DALE T. PLOWDEN,
PETITIONERS,

versus

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, filed August 9, 1967, it is

ORDERED and DECIDED: That there are deficiencies in income tax for the taxable years, 1960, 1961, 1962, and 1963 in the amounts of $597.38, $2,579.60, $5,975.52, and $280.94, respectively.

(Signed) CRAIG S. ATKINS,
Judge.

Entered: Nov. 1, 1967.

48 T. C. No. 64

TAX COURT OF THE UNITED STATES

RICHARD LEE PLOWDEN AND DALE T. PLOWDEN,
PETITIONERS,

versus

COMMISSIONER OF INTERNAL REVENUE
RESPONDENT

EDWARD LEE ROBERTS, PETITIONER,

versus

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

Docket Nos. 5080-65, 5081-65. Filed August 9, 1967.

Held, that, under Section 1374 of the Internal Revenue Code of 1954, a net operating loss sustained in the taxable year 1963, by a corporation which had elected to be taxed as a small business corporation under Subchapter S of the Internal Revenue Code of 1954 was allowable as a deduction in 1963 to the petitioners, the shareholders of the corporation, only to the extent of the adjusted basis of their stock plus the adjusted basis of any corporate indebtedness to them, and that no greater amount of such net operating loss of the corporation may be taken into account in computing the amount of the 1963 net operating loss of the shareholders for purposes of the carryback provisions of section 172 of the Code.

Richard Lee Plowden and Edward Lee Roberts, *pro se.*

J. Larry Broyles, for the respondent.

OPINION

ATKINS, **Judge**: The respondent determined income tax deficiencies of $597.38, $2,579.60, $5,975.52, and $280.94 against the petitioners Richard Lee Plowden and Dale T. Plowden for the taxable years 1960, 1961, 1962, and 1963, respectively, and deficiencies of $1,213.82, $3,394.59, and $7,079.85 against the petitioner Edward Lee Roberts for the taxable years 1960, 1961, and 1962, respectively. The issue is whether the petitioners are entitled to deduct on their individual returns for the taxable year 1963, their share of the entire net operating loss sustained by their wholly-owned Subchapter S corporation in its taxable year 1963, which would result in net operating loss carryback deductions for the years 1960 through 1962.

All of the facts have been stipulated and the stipulations are incorporated herein by this reference.

The petitioners Richard Lee Plowden and Dale T. Plowden, husband and wife, and the petitioner Edward Lee Roberts are residents of Columbia, South Carolina, and filed Federal income tax returns (the Plowdens filed joint Federal income tax returns) for the taxable years involved with the district director of internal revenue, Columbia, South Carolina. Dale T. Plowden is a party herein solely by reason of having filed joint income tax returns with her husband, and Richard Lee Plowden and Edward Lee Roberts will hereinafter be referred to as the petitioners.

During the years involved herein the petitioner Plowden was president of Plowden and Roberts, Inc., (hereinafter referred to as the "corporation") a corporation chartered in 1958 under the laws of the State of South Carolina and the petitioner Roberts was secretary-treasurer of such corporation. The petitioners each paid in $1,000 when the corporation was formed, and each received 50 percent of the outstanding stock issued by it. On January 1, 1962, the corporation elected taxable status as a small business corporation under the provisions of Subchapter S of the Internal Revenue Code of 1954. Prior to such election its earned surplus was $20,598.24.

In the small business corporation return (Form 1120-S) filed by the corporation for the taxable year 1962, it reported taxable income of $30,887.32 and reported the petitioners' undistributed taxable income to be $30,852.64. The Form 1120-S filed by the corporation for the taxable year 1963 showed a net operating loss of $109,229.80. In their individual returns for the taxable year 1963 each of the petitioners claimed as a loss deduction one-half of the corporation's reported net operating loss for that year. The petitioner Plowden reported a net operating loss of $36,909.21 on his return for the taxable year 1963, and the petitioner Roberts reported a net operating loss of $34,078.71 on his return for the taxable year 1963. In February, 1964, each of the petitioners filed with the district director of internal revenue an Application for Tentative Carryback Adjustment (Form 1045), under section 6411 of the Internal Revenue Code of 1954, requesting the carryback of his net operating loss for 1963 to the taxable years 1960, 1961, and 1962. Pursuant to such application, the district director allowed such adjustments for the taxable years 1960, 1961, and 1962 and made refunds in the respective amounts of $597.38, $2,579.60, and $5,975.52 for the petitioner Plowden, and in the respective amounts of $1,213.82, $3,394.59, and $7,079.85 for the petitioner Roberts.

In the notices of deficiency the respondent determined that the petitioners Plowden and Roberts were entitled to deduct for the taxable year 1963 only $16,426.32 and $21,426.32, respectively, of the corporation's net operating loss for that year. The respondent calculated the allowable losses by limiting the loss in each case to the cost of the petitioner's stock in the corporation and the petitioner's share of undistributed taxable income from the corporation for the taxable year 1962. To this sum the respondent added, in the case of the petitioner Roberts, the amount of $5,000 representing the amount owed by the corporation to Roberts as of the end of the corporation's taxable year 1963. The amount of the corporation's net operating loss allowed each petitioner as a deduction for 1963 and the amounts disallowed in the notices of deficiency are as follows:

	Edward Lee Roberts		*Richard Lee Plowden*	
Loss claimed per return		$54,614.90		$54,614.90
Original cost of stock	$ 1,000.00		$ 1,000.00	
Share of undistributed taxable income (1962)	15,426.32		15,426.32	
Share of liability owed shareholder	5,000.00		0	
Total loss allowed		21,426.32		16,426.32
Loss disallowed		$33,188.58		$38,188.58

The disallowances shown above resulted in the determination that the petitioners did not sustain net operating losses for the taxable year 1963, that, accordingly, no net operating loss carrybacks were available to them as deductions for the taxable years 1960, 1961, and 1962, and that there are deficiencies against the petitioner Plowden for each of the taxable years 1960, 1961, 1962, and 1963, and against the petitioner Roberts for each of the taxable years 1960, 1961, and 1962.[6]

The petitioners complain that the respondent has not given them the full benefit of the corporation's net operating loss for its taxable year 1963. For reasons set forth hereinafter, we think that the respondent's determinations were correct.

Since the corporation, with the consent of its stockholders, the petitioners, elected under section 1372 of the Internal Revenue Code of 1954,[7] not to be subject to the taxes imposed by chapter 1 of the Code, its stockholders

[6] Although the respondent's determination with respect to the petitioner Roberts eliminated any net operating loss for 1963 available as a carryback, it did not result in the determination that Roberts had taxable income for the year 1963.

[7] Section 1372 of the Code provides, in part, as follows:

(a) Eligibility.—Except as provided in subsection (f), any small business corporation may elect, in accordance with the provisions of this section, not to be subject to the taxes imposed by this chapter. Such election shall be valjd only if all persons who are shareholders in such corporation—

(1) on the first day of the first taxable year for which such election is effective, if such election is made on or before such first day, or

(2) on the day on which the election is made, if the election is made after such first day, consent to such election.

(b) Effect.—If a small business corporation makes an election under subsection (a), then—

(1) with respect to the taxable years of the corporation for which such election is in effect, such corporation shall not

are subject to the provisions of sections 1373 through 1376 of the Code.

Section 1373 of the Code provides that the undistributed taxable income of an electing small business corporation for any taxable year shall be included in the gross income of the shareholders in the manner and to the extent set forth therein.

Section 1374(b) of the Code provides that each person who is a shareholder of an electing small business corporation during a taxable year of the corporation in which it has a net operating loss shall be allowed as a deduction from gross income, for his taxable year in which or with which the taxable year of the corporation ends, an amount equal to his portion, as determined under subsection (c), of the corporation's net operating loss. Subsection (c) contains the following limitation:

> (2) Limitation.—A shareholder's portion of the net operating loss of an electing small business corporation for any taxable year shall not exceed the sum of—
>
> (A) the adjusted basis (determined without regard to any adjustment under section 1376 for the taxable year) of the shareholder's stock in the electing small business corporation, determined as of the close of the taxable year of the corporation • • • and
>
> (B) the adjusted basis (determined without regard to any adjustment under section 1376 for the taxable year) of any indebtedness of the corporation to the shareholder, determined as of the close of the taxable year of the corporation • • •.

---

be subject to the taxes imposed by this chapter and, with respect to such taxable years and all succeeding taxable years, the provisions of Section 1377 shall apply to such corporation, and

(2) with respect to the taxable years of a shareholder of such corporation in which or with which the taxable years of the corporation for which such election is in effect and, the provisions of Sections 1373, 1374, and 1375 shall apply to such shareholder, and with respect to such taxable years and all succeeding taxable years, the provisions of Section 1376 shall apply to such shareholder.

Section 1376 of the Code [6] provides for adjustments to the basis of a shareholder's stock and the basis of any indebtedness of the corporation to a shareholder.

In the case of the petitioner Plowden the respondent's disallowance, as a deduction to him for 1963, of a portion of the corporation's net operating loss for that year resulted in the determination of a deficiency against him for that year, and in the case of each petitioner the disallowance resulted in the determination that he had no net operating loss for the year 1963 and hence was not entitled to net operating loss carrybacks to the taxable years 1960, 1961, and 1962.

Under the statutory provisions it is clear that the petitioners are not entitled to deduct for the taxable year 1963 the full amount of the corporation's net operating loss for that year. The respondent has properly limited, in accordance with section 1374(c)(2), the amount of the deduction to which each petitioner is entitled for the taxable year 1963 on account of the corporation's net operating loss. He has properly increased the basis of the petitioners' stock by the amount of the corporation's undistributed taxable income for the corporation's taxable year 1962, and has taken into account the indebtedness of the corporation to the petitioner Roberts. The petitioners make some point of the fact that subchapter S does not define the term "adjusted basis" of stock referred to in section 1374(c)(2). However, we think it obvious that Congress intended that the general basis provisions of the Code

[6] Section 1376 of the Code provides in part as follows:

(a) Increase in Basis of Stock for Amounts Treated as Dividends.—The basis of a shareholder's stock in an electing small business corporation shall be increased by the amount required to be included in the gross income of such shareholder under section 1373(b), but only to the extent to which such amount is included in his gross income in his return, increased or decreased by any adjustment of such amount in any redetermination of the shareholder's tax liability.

(b) Reduction in Basis of Stock and Indebtedness for Shareholder's Portion of Corporation Net Operating Loss.—

(1) Reduction in basis of stock.—The basis of a shareholders' stock in an electing small business corporation shall be reduced (but not below zero) by an amount equal to the amount of his portion of the corporation's net operating loss for any taxable year attributable to such stock (as determined under Section 137(c)).

should be applicable, with the adjustments provided by section 1376. See *Byrne v. Commissioner*, (C.A. 7) 361 F. (2d) 939, affirming 45 T. C. 151. Section 1011 provides that the adjusted basis shall be the basis determined under section 1012 or other applicable sections, adjusted as provided in section 1016, and section 1012 provides that the basis of property shall be the cost except as otherwise provided. The respondent has here taken as the adjusted basis of the stock the amount paid therefor, namely, $1,000 in the case of each petitioner and has added thereto each petitioner's share of the corporation's undistributed taxable income for the corporation's taxable year 1962, in accordance with section 1376(a) of the Code.

The petitioners contend that the limitation contained in section 1374(c) applies only for purposes of determining the amount of the deduction to which the shareholder is entitled in computing gross income for the pertinent taxable year and that such section is totally silent as to the further use by the shareholder of the balance left of the corporation's net operating loss as a carryback to past years. They claim that under the circumstances they should "have 100 percent carryback recoveries for any corporate net operating loss" under section 172 of the Code. However, there is no support in the Code for such position. Section 172 of the Code, which provides for the carryback of net operating losses, defines the term "net operating loss" for any taxable year as "the excess of the deductions allowed by this chapter [chapter 1] over the gross income." Accordingly, in determining the net operating loss of each petitioner for 1963, which may be carried back to prior years, the statute does not permit any deduction on account of the net operating loss of the corporation for the taxable year 1963, in excess of the amount computed in accordance with the limitation set forth in section 1374(c)(2). Nor is there any other provision of the Code which permits the petitioners to utilize the corporation's net operating loss.

The gist of the petitioners' argument appears to be that, since the corporation is an electing small business corporation under subchapter S and hence is not taxable, and that since they are responsible for paying the tax,

they should be entitled to full use of the corporation's net operating loss. The simple answer to this is that the statute does not so provide, and the petitioners' argument would be more properly addressed to Congress than to this Court, which is bound to enforce the statutes as enacted by Congress.

The respondent's determination is approved.

Decisions will be entered for the respondent.

CLERK'S OFFICE

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

May 23, 1968

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No. 12,111, Edward Lee Roberts vs. Commissioner of Internal Revenue

No. 12,253, Richard Lee Plowden and Dale T. Plowden, vs. Commissioner of Internal Revenue.

Gentlemen and Mrs. Plowden:

This is to advise that the above-entitled cases will be called for argument at Richmond, Virginia, on Wednesday, June 19, 1968.

The convening hour of the Court is 9:30 a. m., DST.

I have been directed by Chief Judge Haynsworth to inform counsel that the calendar has been set permanently and that there will be no changes.

To facilitate the handling of cases each day, it is requested that counsel be present by 9:00 o'clock on the day of the argument.

Please acknowledge receipt of this one and only notice.

Sincerely yours,

SAMUEL W. PHILLIPS, CLERK,
By MARGARET L. DAVIS,
MISS MARGARET L. DAVIS,
Chief Deputy Clerk.

MLD:bmn

2512 Heyward Street
Columbia, S. C.
May 25, 1968

Clerk's Office
United States Court of Appeals For The Fourth Circuit
Room 402—Post Office Building
Richmond 23219
Virginia

ATTENTION: Mr. Samuel W. Phillips, Clerk

Re: No. 12,111 Edward Lee Roberts vs. Commissioner of Internal Revenue

Dear Mr. Phillips:

I herewith acknowledge receipt of your letter of May 23, 1968, giving me notice, as well as the other parties to the above referenced proceeding, that said proceeding will be called for argument at Richmond, Virginia on Wednesday, June 19, 1968. As this is a Pro Se proceeding, I will be present when the Court convenes at 9:30 A. M. on June 19th.

Respectfully yours,

EDWARD LEE ROBERTS,
Petitioner-Appellant,
Pro Se.

ELR/m
cc

CLERK'S OFFICE

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

June 12, 1968

Mr. E. L. Roberts
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Columbia, South Carolina 29205
Mr. Richard Lee Plowden
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Washington, D. C. 20224

No. 12,111, Edward Lee Roberts vs. Commissioner of Internal Revenue

No. 12,253, Richard Lee Plowden and Dale T. Plowden vs. Commissioner of Internal Revenue.

Gentlemen:

The Court has directed me to notify you that the above cases will not be called for oral argument on June 19, 1968, as previously scheduled. For that reason it will not be required that counsel appear.

Sincerely yours,

SAMUEL W. PHILLIPS, CLERK,
By MARGARET L. DAVIS,
Chief Deputy Clerk.

MLD:bmn

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In the Supreme Court of the United States

OCTOBER TERM, 1960

EDWARD LEE ROBERTS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

RAYMOND LEE PLOWDEN AND DALE T. PLOWDEN,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

[illegible]
Counsel

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Department of Justice
Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 445

EDWARD LEE ROBERTS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

RICHARD LEE PLOWDEN AND DALE T. PLOWDEN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Each petitioner[1] owned a 50 percent interest in a corporation. Pursuant to Section 1372 of the Inter-

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[1] These cases were consolidated for hearing in the Tax Court. Because the issue arises entirely out of Richard Lee Plowden's and Edward Lee Roberts' ownership of stock in a corporation, "petitioners" will refer to them. Dale T. Plowden was a party solely because she filed joint returns with her husband, Richard Lee Plowden.

nal Revenue Code of 1954, the corporation elected to be treated as a Subchapter S[2] corporation, whereby electing small business corporations are permitted to dispense with tax at the corporate level and to "pass through" income or losses to their shareholders. In 1963, the corporation sustained a net operating loss, which was passed through to petitioners. At issue is the proper construction of Section 1374(c)(2), which in terms limits the deduction by a shareholder of his portion of the company's net operating loss to the adjusted basis of his stock and the indebtedness of the corporation to him.[3] Below, petitioners urged that

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[2] Sections 1371 through 1378 of the 1954 Code.

[3] Section 1374 reads in pertinent part as follows:

> (a) *General Rule.*—A net operating loss of an electing small business corporation for any taxable year shall be allowed as a deduction from gross income of the shareholders of such corporation in the manner and to the extent set forth in this section.
>
> (b) [as amended by Sec. 2(b), Act of September 23, 1959, P.L. 86-376, 73 Stat. 699] *Allowance of Deduction.*—Each person who is a shareholder of an electing small business corporation at any time during a taxable year of the corporation in which it has a net operating loss shall be allowed as a deduction from gross income, * * * an amount equal to his portion of the corporation's net operating loss (as determined under subsection (c)).
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> * * * * *
>
> (c) *Determination of Shareholder's Portion.*—
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> * * * *
>
> (2) *Limitation.*—A shareholder's portion of the net operating loss of an electing small business corporation for any taxable year shall not exceed the sum of—
>
> (A) the adjusted basis (determined without regard to any adjustment under section 1376

they were entitled to utilize their pro rata shares of the loss in full, and to the extent that such loss could not be employed in 1963, carry back the loss to prior years in accordance with Section 172 of the Internal Revenue Code of 1954.

The courts below correctly concluded (Pet. 11) that the benefits of Sections 172 and 1374 are mutually exclusive and not cumulative. There is no conflict and no occasion for review in this Court.

1. Although Section 172 allows carry backs and carry forwards of operating losses if various specified conditions are met, Section 172(h) expressly provides that for the purposes of Section 172 "the net operating loss deduction * * * of any corporation" shall not include "the net operating loss of such corporation for any taxable year for which such corporation is an electing small business corporation under subchapter S." Section 1374 does provide that, in the case of a

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for the taxable year) of the shareholder's stock in the electing small business corporation, determined as of the close of the taxable year of the corporation (or, in respect of stock sold or otherwise disposed of during such taxable year, as of the day before the day of such sale or other disposition), and

(B) the adjusted basis (determined without regard to any adjustment under section 1376 for the taxable year) of any indebtedness of the corporation to the shareholder, determined as of the close of the taxable year of the corporation (or, if the shareholder is not a shareholder as of the close of such taxable year, as of the close of the last day in such taxable year on which the shareholder was a shareholder in the corporation).

Subchapter S corporation, the shareholders will be permitted to use the loss, but Section 1374(c)(2) expressly provides that a shareholder's portion of the net operating loss shall not exceed his investment in the corporation. The decision below is the only one possible under this statutory format.[4] *Byrne* v. *Commissioner*, 361 F. 2d 939 (C.A. 7), the only other decision in point, is in accord.

2. The court of appeals did not (see Pet. 3) deprive petitioners of due process in dispensing with oral argument in this case, which involves solely the interpretation of a statute that, on its face, is clear and unequivocal in its meaning. See, e.g., *Communications Comm'n* v. *WJR*, 337 U.S. 265, 275-276.

Respectfully submitted.

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SEPTEMBER 1968.

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[4] Thus, the courts below properly limited the deductions to the petitioners' cost of their stock, plus their share of the corporation's undistributed taxable income, plus, in the case of petitioner Roberts, the amount of $5,000 owed by the corporation to him as of the end of the corporation's taxable year 1963.

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